# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 13, 2013 |
| v | No. 310136<br>Wayne Circuit Court |
| MICHAEL JAJUAN WILLIAMS,<br><br>Defendant-Appellant. | LC No. 11-008692-FC |

Before: RIORDAN, P.J., and TALBOT and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to consecutive prison terms of 12 to 25 years for the armed robbery conviction and two years for felony-firearm. We affirm.

At approximately 7:30 a.m. on August 19, 2011, the supervisor of the CVS Pharmacy located in Brownstown Township was in the store when she felt a gun to her back. A man asked for money. The supervisor went into the office and unlocked the safe, placing the cash in a red CVS bag. The robber became upset when he realized that she did not place the coins in the bag, and he began to dig the coins out of the safe. The robber was wearing mechanic, not winter, gloves that were black on one side and white on the other side. He also had a book bag and sunglasses. The robber handed the supervisor a surge protector and instructed her to tie her own hands, but she was unable. He ripped the phone cord out and tied the supervisor's hands with the cord, ordered her to get under a desk, and instructed her not to follow him. After the robber exited the office, the supervisor jumped up from under the desk, unrolled the cord from her hands, and dialed 911. The robbery was captured on the store's video surveillance system, but the store supervisor could not identify the robber.

The store pharmacist was sitting in the parking lot when he noticed a man leave the store. Despite the fact that it was August, the man was "bundled up" with a hood and sunglasses on. The man jogged toward Telegraph Road and proceeded north and east away from the store. The store cashier advised the pharmacist that the supervisor had just been robbed. Within a minute of seeing the man flee the building, the store employees stopped the police from entering the store parking lot and pointed out the direction the robber had travelled on foot.

A police officer received a radio bulletin that the suspect in the CVS robbery was an African-American male wearing a black hat, dark pants, and a backpack. The officer proceeded toward an apartment complex one-quarter mile from the CVS store where he saw defendant, an individual matching the description of the robber, who was walking fast. Defendant looked in the officer's direction and moved behind an apartment building. The officer drove north past this building, losing sight of defendant for 10 to 20 seconds, and found defendant walking with dark pants and a white shirt. The officer commanded defendant to put his hands up and lay on the ground. Defendant did not comply until additional officers arrived on the scene. In bushes near the apartment building where the officer briefly lost sight of defendant, responding officers found the backpack, hat, and hoodie. They found black and white gloves in defendant's pocket and a multi-color gun in his waistband that was the same gun displayed on the store's surveillance video. They also found the currency and coins missing from the CVS safe. Defendant was convicted as charged.[1]

Defendant argues that the trial court erred in scoring Offense Variables 8 and 12. We disagree. The sentencing court has the discretion to determine the number of points to be scored provided that there is record evidence to justify the particular score. *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009). On appeal, this Court reviews the trial court's scoring to determine whether it properly exercised its discretion and upholds a scoring decision for which there is any evidence in support. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009).

For Offense Variable (OV) 8, the sentencing court may assign 15 points to a defendant's score if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Asportation is not defined in the sentencing guidelines statutes. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). In *Steele*, 283 Mich App at 490-491, the defendant took one victim to a trailer on his property where he sexually assaulted her, took another victim to a tree stand where he sexually assaulted her, and took a third victim on a dirt bike ride away from the house where he assaulted her. This Court upheld the trial court's scoring on OV 8, finding that "[t]he trailer, the tree stand, and the dirt-bike destination are all places or situations of greater danger because they are places where others were less likely to see defendant committing crimes." *Id*. at 491. Similarly, in this case, defendant held a gun to the victim's back, directed her to the back office away from the front of the store where the cashier and potential other customers were, ordered her to open the safe, tied her up with a phone cord, and forced her under a desk. None of these actions could be considered "incidental to

[1] A recorded statement given by defendant was presented to the jury, but the DVD was not preserved in the lower court record.

commission of the crime." *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010).[2] Therefore, given this evidence, we uphold the trial court's scoring decision on OV 8.

OV 12 establishes the scoring guidelines for the trial court to use "to determine whether [a] defendant engaged in any 'contemporaneous felonious criminal acts.'" *People v Bemer*, 286 Mich App 26, 32; 777 NW2d 464 (2009), quoting MCL 777.42(1). If the trial court finds that the defendant committed two contemporaneous felonious criminal acts involving other crimes, then the court may allocate five points for OV 12. MCL 777.42(1)(e). "Therefore, when scoring OV 12, a court must look beyond the sentencing offense and consider only those separate acts or behavior that did not establish the sentencing offense." *People v Light*, 290 Mich App 717, 723; 803 NW2d 720 (2010).

MCL 777.42(1)(d) and (e) direct a sentencing court to score five points for OV 12, involving contemporaneous felonious criminal acts, if "[o]ne contemporaneous felonious criminal act involving a crime against a person was committed" or if "[t]wo contemporaneous felonious criminal acts involving other crimes were committed." The Supreme Court held that "a trial court may consider facts and circumstances not proven beyond a reasonable doubt in imposing a sentence within the statutory range." *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007) (citation, quotation, and emphasis omitted). "As long as the defendant receives a sentence within [the] statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Here, defendant was convicted of armed robbery and felony-firearm. The trial court scored five points on OV 12 for the contemporaneous criminal acts of felon in possession of a firearm and carrying a concealed weapon. Defendant had not been charged with those offenses. However, evidence was presented at trial that defendant was carrying a concealed weapon in the waistband of his pants and that he was in possession of a firearm. At sentencing, the trial court stated that defendant was on probation for a case that involved possession of the drug ecstasy. Accordingly, the trial court did not abuse its discretion in scoring five points for OV 12 for two contemporaneous felonious criminal acts involving other crimes. MCL 777.42(1)(e). Because no error occurred in the scoring of defendant's sentencing variables, his minimum sentencing guideline range has not changed, and he is not entitled to resentencing. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006).

Defendant raises three additional issues in a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4. First, he argues that the trial court denied him his choice of counsel. During the course of the proceedings, defendant had four separate attorneys. Defendant was charged in August 2011. His first counsel requested withdrawal in November 2011, stating that there had been a breakdown in communication. After questioning defendant, the trial court granted counsel's request. A court appointed attorney filed

[2] Although this ruling was rendered in an order, not an opinion, an order of the Supreme Court is binding precedent when the rationale can be understood. *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

an appearance and appeared in court at the end of November 2011. Defendant's retained counsel, David Dunn, then filed an appearance in January 2012. After his appearance, criminal charges were filed against Dunn involving an unrelated criminal case. Although Dunn appeared for trial in April 2012, he was unprepared and had not reviewed discovery. Before the start of the trial, Dunn failed to respond to the trial court's inquiry regarding whether he was planning to represent defendant, and Dunn's criminal attorney advised the prosecutor that Dunn was not representing any clients at that time. In the meantime, the trial court had appointed Robert Slameka to represent defendant approximately two weeks before trial. Slameka had reviewed discovery, met with defendant, and was prepared for trial. The first time Dunn actually appeared in court to represent defendant was on the first day of trial, and the trial court denied his request for a continuance. The trial court allowed Dunn to sit next to Slameka and consult with him on breaks. The trial court stated on the record, "It is my understanding that [defendant] wishes to go through with Mr. Slameka as Counsel." The trial court expressly asked defendant if that was his understanding, and he responded, "Yes, Your Honor." Consequently, defendant was advised of the circumstances and preparedness of his retained and appointed trial counsel before the start of trial and again at sentencing when he expressed dissatisfaction with Dunn, his retained attorney.

This Court reviews for an abuse of discretion a lower court's decision affecting a criminal defendant's right to counsel of choice and its denial of a motion to adjourn the trial proceedings to allow defendant to obtain new counsel. *People v Akins*, 259 Mich App 545, 556-557; 675 NW2d 863 (2003). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes. *People v Malone*, 287 Mich App 648, 661; 792 NW2d 7 (2010). However, in light of the fact that defendant expressly approved of retained counsel's representation at trial when questioned by the trial court, he waived this claim of error regarding his choice of counsel, and the waiver extinguishes any underlying error, preventing appellate review of the claimed violation of that right. *People v Vaughn*, 491 Mich 642, 663; 821 NW2d 288 (2012); *People v Carines*, 460 Mich 750, 762 n 7; 597 NW2d 130 (1999). Furthermore, in light of the prior adjournment, the number of attorneys fired by defendant, the impact of these events on the scheduling of trial (a five to six month delay), and the uncertainty regarding the availability and preparedness of retained counsel, the trial court's denial of a continuance of trial did not constitute an abuse of discretion. *Akins*, 259 Mich App at 556-557.

Next, defendant argues that the trial court abused its discretion in ruling that officers had probable cause to arrest him because he did not fit the description of the suspect. We disagree. Probable cause has been characterized as "any facts which would induce a fair-minded person of average intelligence and judgment to believe that the suspected person has committed a felony." *People v Coward*, 111 Mich App 55, 60; 315 NW2d 144 (1981) (citation and quotation omitted). In the present case, police officers were called to the scene in response to a police broadcast that a robbery had occurred with a description of the suspect. By statute, an arresting officer may proceed to act without a warrant when he has received "positive information broadcast from a recognized police or other governmental radio station . . . that affords the peace officer reasonable cause to believe . . . a felony has been committed and reasonable cause to believe the person committed it." MCL 764.15(f). The facts offered in support of the belief that probable cause exists must be present at the time of arrest. *Coward*, 111 Mich App at 60. An authorized police bulletin reporting that a felony has been committed, when coupled with other facts and circumstances, provides probable cause for an arrest without a warrant. *Id.* at 61. "A police officer who has received by radio the details of the commission of a felony, including a

description of the perpetrators, has probable cause to arrest persons matching that description who are traveling on a possible escape route from the scene of the crime shortly after its commission." *People v Knight*, 41 Mich App 293, 294; 199 NW2d 861 (1972). Accordingly, when police respond to a radio bulletin advising of a recently committed felony, the officer's observation of the alleged felon, the similarity of the alleged felon to the description transmitted over the radio broadcast, and overt action, such as flight or furtive gestures, provides probable cause to arrest without a warrant. See *Coward*, 111 Mich App at 61.

In the present case, the robber was wearing dark clothing, a hood, and backpack as he was observed jogging away from the CVS store. He proceeded to travel north and east away from the scene. A police bulletin contained a description of defendant as wearing dark pants, a dark hat, and backpack. A responding officer proceeded to an apartment complex located northeast and one-quarter mile from the CVS store robbery. There, he observed defendant walking fast and wearing the clothing and backpack described in the radio broadcast. After looking in the officer's direction, defendant moved behind an apartment building. When he reappeared in the view of the officer, he was wearing dark pants and a white shirt. Police had probable cause to arrest defendant because he matched the radio bulletin's description of the robber and was apprehended in the area where store employees indicated that the robber had fled within minutes of the robbery. *Knight*, 41 Mich App at 294. The fact that defendant attempted to evade police by discarding clothing and his backpack in the bushes by the apartment building does not alter the fact that he matched the description of the perpetrator of the robbery.

Finally, defendant argues that the court abused its discretion by allowing the jury to view his interrogation video recording, in which it was mentioned that defendant was on probation for a prior drug possession. Defense counsel sought to have the mention of defendant's prior conviction edited out of the recording, but the parties were unable to edit the recording to remove the reference.[3] The trial court allowed the video to be played with the reference. The decision whether to admit evidence is within a trial court's discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), this Court articulated the factors that must be present for other acts evidence to be admissible. First, the evidence must be relevant to an issue other than propensity. *Id*. at 74. Second, "the evidence must be relevant under MRE 402, as enforced through MRE 104(b)[.]" *Id*. Third, the probative value of the evidence must not be substantially outweighed by unfair prejudice under MRE 403. *Id*. at 74-75; *People v Ullah*, 216 Mich App 669, 674-675; 550 NW2d 568 (1996). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *VanderVliet*, 444 Mich at 75.

In this case, the trial court acknowledged that evidence of defendant's prior bad act was not admissible, but ruled that it could not be separated from the rest of defendant's statement. Before the start of the trial, the trial court proposed a limiting instruction, and all parties

[3] The video recording also contained references to other robberies, but the parties agreed to completely stop playing the recording at that point.

acquiesced to the language of the instruction. The trial court read the following instruction to the jury:

> There is evidence that the Defendant was convicted of possession of a controlled substance in the past. This fact should not be considered in determining whether or not he's guilty of the crime of which he's currently charged. A past conviction is not evidence that the Defendant committed the crimes in this case.

Under the circumstances, the trial court did not abuse its discretion. *Katt*, 468 Mich at 278. The reference to defendant's prior drug related offense in the interrogation did not amount to unfair prejudice in light of the overwhelming evidence that defendant committed the crimes charged. Moreover, the jury was instructed by the trial court not to consider this as evidence in determining whether he was guilty of armed robbery and felony-firearm. Jurors are presumed to follow their instructions. *People v Dupree*, 486 Mich 693, 711; 788 NW2d 399 (2010).

Affirmed.

/s/ Michael J. Riordan
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood